Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Policies Regarding Mobile Spectrum Holdings	)	WT Docket No. 12-269

COMMENTS OF THE COMPETITIVE CARRIERS ASSOCIATION

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The Competitive Carriers Association ("CCA") hereby submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The Competitive Carriers Association ("CCA") applauds the Commission for opening a proceeding to reform its approach to evaluating spectrum aggregation in the wireless marketplace. As an association representing more than 100 competitive wireless carriers, including many regional and rural providers, CCA is committed to helping the Commission develop new and better tools to promote efficient use of spectrum resources, to encourage entry and expansion by competitive carriers, and to prevent further entrenchment of duopoly conditions. As the Commission has explained, "[s]pectrum is the lifeblood of the wireless industry," and CCA agrees that the Commission "has a unique responsibility to ensure that spectrum is allocated in a manner that promotes actual and potential competition and that incentives are maintained for innovation and efficiency in the mobile services marketplace."[2]

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1 *Policies Regarding Mobile Spectrum Holdings*, WT Docket No. 12-269, Notice of Proposed Rulemaking, FCC 12-119 (rel. Sep. 28, 2012) ("NPRM").

2 *Application of AT&T Inc. and Qualcomm Incorporated For Consent to Assign Licenses and Authorizations*, Order, 26 FCC Rcd 17589 ¶ 30 (2011) ("*AT&T-Qualcomm Order*").

Unfortunately, the Commission's current approach to evaluating spectrum acquisitions—a blunt, single-trigger "screen" adopted nearly a decade ago, before a wave of consolidation resulted in substantially increased market concentration—fails to advance the Commission's stated goals in today's marketplace. Among other things, the current screen fails to account for important differences between high and low frequency spectrum bands, includes certain bands that are unsuitable for mobile broadband while excluding bands that are (or will soon be) suitable, and largely ignores the competitive effects of spectrum aggregation at the national level. Moreover, the consequence of exceeding the screen is a purportedly more *detailed* analysis of the transaction's competitive effects in the relevant local markets, but not necessarily a more *stringent* or *critical* analysis. This broken screen has enabled AT&T and Verizon, through purchases at auction and through secondary market transactions large and small, to aggregate vast amounts of beachfront spectrum across their respective nationwide footprints while too often avoiding the heightened competitive scrutiny that should apply to such acquisitions.

The Commission thus should overhaul its spectrum screen to better reflect today's competitive realities. First, the Commission should calibrate its screen to the competitive challenges facing today's industry by applying three independent thresholds to spectrum acquisitions: one targeted specifically at local spectrum holdings below 1 GHz, one that evaluates an entity's aggregate local spectrum holdings (both above and below 1 GHz), and one for nationwide holdings. Second, the Commission should eliminate from the analysis any spectrum bands that no longer are suitable for mobile broadband, establish a clear and predictable process for adding newly suitable bands to the screen, and adjust its attribution rules to capture only those interests that are competitively significant. And third, the Commission should establish a rebuttable presumption that transactions exceeding any of the new thresholds

would be contrary to the public interest. Such reforms not only would strengthen the screen as a tool for evaluating the competitive effects of spectrum transactions, but also would provide the necessary certainty to entities contemplating spectrum acquisitions.

DISCUSSION

I. CCA AGREES WITH THE COMMISSION THAT THE CURRENT SPECTRUM SCREEN IS BROKEN AND IN NEED OF REFORM

The Commission adopted its screen nearly a decade ago, at a time when the wireless landscape looked much different than it does today. In 2001, the Commission issued an order announcing that it would be relaxing its approach to spectrum aggregation by replacing its previous spectrum cap with a "case-by-case" analysis, effective January 1, 2003.[3] In justifying this relaxation of its competitive analysis, the Commission pointed to the fact that "mobile telephony markets ha[d] experienced and continue to experience strong growth, increased competition, and active innovation."[4] When the Commission then used its spectrum screen for the first time in 2004 to evaluate the competitive effects of the AT&T/Cingular transaction,[5] it did so at a time when "effective competition" existed in the mobile wireless industry.[6] Indeed, the Commission relied on this finding of "effective competition" when establishing the screen's

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3 *2000 Biennial Regulatory Review; Spectrum Aggregation Limits for Commercial Mobile Radio Services*, Report and Order, 16 FCC Rcd 22668 ¶ 1 (2001).

4 *Id.* ¶ 30.

5 *See Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 19 FCC Rcd 21522 ¶ 109 (2004) ("*AT&T-Cingular Order*").

6 *See id.* ¶ 107; *see also Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Ninth Report, 19 FCC Rcd 20597 ¶ 2 (2004).

threshold of one-third of the useable spectrum in a given local market[7]—a threshold that remains in effect today.[8] And even though fewer spectrum bands were available for wireless telephony a decade ago, the Commission found that smaller carriers could compete effectively against the major wireless providers using "far lower amounts of bandwidth,"[9] given that bandwidth-intensive data services were barely used by consumers.

Since that time, however, the wireless industry has undergone significant changes. As the NPRM notes, the number of nationwide wireless carriers has declined from six in 2003 to four in 2012, and during that span, several "regional and rural facilities-based providers have exited the marketplace through mergers and acquisitions."[10] Consolidation in the wireless industry, as measured by the Herfindahl-Hirschman Index ("HHI") increased from 2,151 in 2003 to an alarming 2,848 in 2010 (where an HHI of greater than 2,500 indicates a "highly concentrated" market).[11] As a result, the Commission has been unable for the past two years to conclude that the wireless marketplace is characterized by "effective competition."[12]

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7 *See AT&T-Cingular Order* ¶ 107 (explaining that the Commission "chose the concentration thresholds for this screen based on our observation . . . that there is generally effective competition in mobile telephony markets today").

8 *See* NPRM ¶ 17 ("The current screen identifies local markets where an entity would acquire more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services.").

9 *AT&T-Cingular Order* ¶ 109.

10 NPRM ¶ 14.

11 *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Mobile Conditions with Respect to Commercial Mobile Services*, Fifteenth Report, 26 FCC Rcd 9664 ¶ 2 (2011) ("*15th Mobile Wireless Competition Report*").

12 *See id.*; *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Fourteenth Report, 25 FCC Rcd 11407 ¶ 3 (2010).

Moreover, even as more spectrum has become available for mobile wireless use, the two largest wireless carriers—AT&T and Verizon—not only have acquired smaller rivals but have engaged in "significant spectrum-only transactions" that have only strengthened their spectrum position vis-à-vis competitive carriers.[13] These transactions include Verizon's 2012 acquisition of AWS-1 licenses from SpectrumCo and Cox,[14] AT&T's 2011 acquisition of Qualcomm's nationwide Lower 700 MHz downlink spectrum,[15] and AT&T's over 40 proposed transactions to acquire dozens of 700 MHz and AWS-1 licenses from Triad 700, CenturyTel Broadband Wireless, and others.[16] Just this August, AT&T announced yet another major spectrum deal,

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13 NPRM ¶ 14.

14 *See generally Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 (2012) ("*Verizon-SpectrumCo Order*");

15 *See generally AT&T-Qualcomm Order*.

16 *See* Public Notice, *AT&T Mobility Spectrum LLC and Triad 700, LLC Seek FCC Consent to the Assignment of 27 Lower 700 MHz Band B Block Licenses*, ULS File No. 0005286787, DA 12-1244 (rel. Aug. 1, 2012); Public Notice, *AT&T Mobility Spectrum LLC and CenturyTel Broadband Wireless, LLC Seek FCC Consent to the Assignment of Lower 700 MHz Band and AWS-1 Licenses*, ULS File No. 0005337520, DA 12-1479 (rel. Sep. 11, 2012); Public Notice, *AT&T Mobility Spectrum LLC and Cavalier Wireless, LLC Seek FCC Consent to the Assignment of Ten Lower 700 MHz Band B Block Licenses and 41 Advanced Wireless Services License*, ULS File No. 0005295740, DA 12-1247 (rel. Aug. 1, 2012); Public Notice, *AT&T Mobility Spectrum LLC and David L. Miller Seek FCC Consent to the Assignment of 13 Lower 700 MHz Band B Block Licenses*, ULS File No. 0005296026, DA 12-1248 (rel. Aug. 2, 2012); Public Notice, *AT&T Mobility Spectrum LLC and 700 MHz, LLC Seek FCC Consent to the Assignment of Two Lower 700 MHz Band C Block Licenses*, ULS File No. 0005262760, DA 12-1112 (rel. Jul. 11, 2012); Public Notice, *AT&T Mobility Spectrum LLC and Ponderosa Telephone Co. Seek FCC Consent to the Assignment of a Lower 700 MHz Band C Block License*, ULS File No. 0005295055, DA 12-1238 (rel. Aug. 1, 2012); Public Notice, *AT&T Mobility Spectrum LLC and Comsouth Tellular, Inc. Seek FCC Consent to the Assignment of Two Lower 700 MHz Band C Block Licenses*, ULS File No. 0005304258, DA 12-1249 (rel. Aug. 2, 2012); Public Notice, *AT&T Mobility Spectrum LLC and Farmers Telephone Company, Inc. Seek FCC Consent to the Assignment of A Lower 700 MHz Band C Block License*, ULS File No. 0005293645, DA 12-1250 (rel. Aug. 2, 2012); Public Notice, *AT&T Mobility Spectrum LLC and McBride Spectrum Partners, LLC Seek FCC Consent*

proposing to acquire NextWave Wireless and its substantial WCS and AWS spectrum holdings.[17] Making matters worse, this unprecedented consolidation of available spectrum comes at a time when the mobile wireless industry "is increasingly focused on providing data services,"[18] and the Commission has faced difficulty in identifying and allocating additional spectrum for mobile uses. Therefore, the resulting need for spectrum by competitive carriers is now greater than ever.[19]

Chairman Genachowski has often described spectrum as America's "invisible infrastructure," and has promoted goals that maximize the use of what is considered by CCA members to be their lifeblood.[20] As recognized by the Commission, "[a]ccess to spectrum is a precondition to the provision of mobile wireless services," and "[e]nsuring the availability of sufficient spectrum is critical for promoting the competition that drives innovation and investment."[21] The Commission must recognize that control of the lion's share of prime broadband spectrum by one or two carriers makes it increasingly difficult for new entrants or

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to the Assignment of a Lower 700 MHz Band B Block License, ULS File No. 0005323094, DA 12-1252 (rel. Aug. 2, 2012).

17 *See* Public Notice, *AT&T Seeks FCC Consent to the Assignment and Transfer of Control of WCS and AWS-1 Licenses*, WT Docket No. 12-240, DA 12-1431 (rel. Aug. 31, 2012).

18 NPRM ¶ 11.

19 Making matters worse, the Twin Bells are content to stockpile their growing caches of spectrum (limiting supply in the secondary market), and rarely (if ever) provide access to their non-warehoused spectrum on commercially reasonable terms and conditions. Competitive carriers, on the other hand, attempt to acquire spectrum only when they need it to survive and thrive in the marketplace.

20 Julius Genachowski, Chairman, Fed. Commc'n Comm'n, Opening Remarks at the Silicon Flatirons Conference (Feb. 13, 2012), *available at* http://www.youtube.com/watch?v=Pyryxg12hAo; *see also* Julius Genachowski, Chairman, Fed. Commc'n Comm'n, Unleashing America's Invisible Infrastructure, before the FCC Spectrum Summit (Oct. 21, 2010), *available at* http://www.fiercemobilecontent.com/press-releases/chairman-julius-genachowski-remarks-spectrum-summit-unleashing-americas-invisible-inf.

21 NPRM ¶ 4.

other carriers to gain access to spectrum, which in turn prevents access to all other critical inputs, which in turn inhibits effective competition in the industry.

In today's increasingly challenging competitive environment, the Commission's outmoded, single-trigger screen is an ineffectual tool for preventing excessive spectrum aggregation and promoting entry. The current screen fails to differentiate between spectrum holdings below 1 GHz and above 1 GHz, even though, as the Commission has recognized, low-frequency spectrum is far more useful to new entrants in light of its importance for achieving coverage efficiently.[22] The current screen also evaluates spectrum holdings only on a local, market-by-market basis and does not expressly allow for consideration of a carrier's nationwide holdings, despite the Commission's recent acknowledgement that spectrum acquisitions can have significant competitive effects on the national level.[23] Moreover, the screen currently includes spectrum bands that no longer appear to be suitable for mobile broadband—specifically, 12.5 MHz in the SMR band and 10 MHz in the Upper 700 MHz D Block[24]—while excluding significant bands, such as the WCS spectrum being acquired by AT&T.[25] And transactions that trip the screen do not necessarily subject applicants to a more stringent level of competitive review—such as a rebuttable presumption that the transaction would not serve the public interest

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22 *See AT&T-Qualcomm Order* ¶¶ 49-51 (explaining that "[t]he more favorable propagation characteristics of lower frequency spectrum (*i.e.*, spectrum below 1 GHz) allow for better coverage across larger geographic areas and inside buildings," and that access to such spectrum is "important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have a potentially significant impact on competition").

23 *See Verizon-SpectrumCo Order* ¶ 58; *AT&T-Qualcomm Order* ¶ 32; *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, Staff Analysis and Findings, 26 FCC Rcd 16184 ¶ 34 (WTB 2011) ("*AT&T-T-Mobile Staff Analysis*").

24 *See* NPRM ¶ 29 (citing *AT&T-Qualcomm Order* ¶ 42).

25 *See id.* ¶ 28.

and would harm competition and consumers—but instead simply prompt a more *detailed* review in those markets identified by the screen.[26]

As a result, the spectrum screen has become a shield for AT&T and Verizon to avoid competitive scrutiny, rather than a sword for combating the harmful effects of spectrum aggregation. AT&T and Verizon have attempted to capitalize on the uncertainty surrounding the suitability of various bands for mobile broadband by arguing that additional MSS/ATC and BRS/EBS spectrum should be included in the screen[27]—a premature change that would enable them to acquire additional spectrum without triggering the screen. Moreover, while the NPRM asserts that the current rubric does not "limit [the FCC's] consideration of potential competitive harms in proposed transactions solely to markets identified by the initial screen,"[28] the Commission *does* so limit its analysis in practice,[29] enabling the Twin Bells' spectrum acquisitions to avoid competitive scrutiny in local areas across the country. The Commission's spectrum screen thus is plainly broken and warrants a significant overhaul to protect competition and consumers.

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26 *See, e.g., Verizon-SpectrumCo Order* ¶ 48 (noting that the screen merely helps "identify markets where the acquisition of spectrum provides particular reason for further competitive analysis").

27 *See id.* ¶ 60 ("The Applicants in the Verizon Wireless-SpectrumCo transaction contend that spectrum that is suitable and would be available within two years, including, in their view, BRS/Educational Broadband Service ('EBS'), [and] Mobile Satellite Service ('MSS')/Ancillary Terrestrial Component[] ('ATC') . . . ."); *AT&T-Qualcomm Order* ¶ 40 ("[T]he Applicants urge us, as AT&T has in the past, to include all BRS and EBS spectrum in the spectrum screen, . . . [as well as] an additional 90 megahertz of MSS/ATC spectrum . . . .").

28 NPRM ¶ 17.

29 *See, e.g., AT&T-Cingular Order* ¶ 109 (explaining that the "function" of the spectrum screen is "to eliminate from further consideration any market in which there is no potential for competitive harm as a result of this transaction").

II. THE COMMISSION SHOULD STRENGTHEN THE CURRENT SPECTRUM SCREEN TO PRESERVE ENTRY INCENTIVES AND ADDRESS DUOPOLY CONCERNS

CCA believes that the Commission could address many of the current screen's defects by adopting three overarching reforms. First, the Commission should replace the screen's single-threshold approach with three independent thresholds for identifying possible competitive harms: one targeted specifically at local spectrum holdings below 1 GHz, one that evaluates an entity's aggregate local spectrum holdings, and one for nationwide holdings. Second, the Commission should adopt clear rules for determining whether and how to count an entity's spectrum holdings towards the screen—for instance, by eliminating from the analysis any spectrum bands that no longer are suitable for mobile broadband, establishing a clear and predictable process for adding newly suitable bands to the screen, and adjusting the attribution rules to capture only those interests that are competitively significant. And third, the Commission should apply a more stringent competitive analysis to transactions exceeding one or more of the applicable thresholds, principally by establishing a rebuttable presumption that such transactions would be contrary to the public interest and harmful to competition and consumers. In all events, any new evaluative tool adopted by the Commission should focus on promoting competition and preventing the growing spectrum consolidation by the Twin Bells, provide clear rules of the road for entities contemplating spectrum purchases, and establish a more nuanced analysis that assesses each proposed spectrum acquisition in light of the characteristics of the spectrum at issue and the market positions of the applicants.

A. The Commission Should Replace Its Current Single-Trigger Approach with Three Separate Thresholds for Identifying Possible Competitive Harms

As noted above, the Commission currently evaluates proposed spectrum acquisitions by measuring an entity's post-acquisition spectrum holdings in local markets against a single

benchmark—equal to roughly "one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services" in each local market.[30] The Commission has suggested in recent orders that its spectrum aggregation analysis should become more sensitive to the differences between low frequency and high frequency spectrum,[31] and should consider holdings at both local and national levels.[32] Nevertheless, the Commission has not yet formally included these elements into its spectrum screen. The simplest and most effective way to incorporate these elements would be to establish a separate threshold for spectrum holdings below 1 GHz in local markets, in addition to a screen that evaluates an entity's overall spectrum holdings in local markets, and to establish an additional threshold for assessing nationwide spectrum holdings.[33]

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30 NPRM ¶ 17; *see also, e.g., Verizon-SpectrumCo Order* ¶ 59 ("The current screen identifies local markets where an entity would acquire more than approximately one-third of the total spectrum suitable and available for the provision of mobile telephony/broadband services.").

31 *See* NPRM ¶ 35 (recounting that "the Commission has noted that the more favorable propagation characteristics of lower frequency spectrum, *i.e.*, spectrum below 1 GHz, allow for better coverage across larger geographic areas and inside buildings, while higher frequency spectrum may be well-suited for providing capacity, such as in high-traffic urban areas" and that both types of spectrum may be helpful for the deployment of an effective nationwide competitor) (citations omitted). *See also AT&T-Qualcomm Order* ¶ 49 (finding that "it is prudent to inquire about the potential impact of AT&T's aggregation of spectrum below 1 GHz as part of the Commission's case-by-case analysis," and noting that "spectrum resources in different frequency bands can have widely disparate technical characteristics that affect how the bands can be used to deliver mobile services").

32 *See AT&T-Qualcomm Order* ¶ 35 (finding that "it is appropriate also to analyze both the local markets in which consumers purchase mobile wireless services and the potential national competitive impacts of this transaction"); *see also Verizon-SpectrumCo Order* ¶¶ 57-58; *AT&T-T-Mobile Staff Analysis* ¶¶ 33-34; Amended Complaint, *United States of America v. AT&T Inc., et al.*, Case No. 1:11-01560, ¶¶ 17-21 (D.D.C. Sept. 16, 2011) ("*DOJ AT&T-T-Mobile Complaint*").

33 While formulation of a screen distinguishing between spectrum below 1 GHz from a screen evaluating aggregate spectrum holdings offers the simplest and most administrable method to revise the screen reflecting critical differences between spectrum bands in the

1. *Spectrum Below 1 GHz in Local Markets*

For holdings below 1 GHz in a particular local market, the Commission should adopt a lower threshold of one-quarter of the useable spectrum in that market. Spectrum below 1 GHz is an especially critical input for new entrants. As the Commission has explained, "low-band spectrum can provide the same geographic coverage, at a lower cost, than higher-frequency bands," whereas "[a] licensee that exclusively or primarily holds spectrum in a higher frequency range generally must construct more cell sites (at additional cost) than a licensee with primary holdings at a lower frequency in order to provide equivalent service coverage, particularly in rural areas."[34] Therefore, access to low-frequency spectrum is vitally "important for other competitors to meaningfully expand their provision of mobile broadband services or for new entrants to have a potentially significant impact on competition."[35] The importance of low-frequency spectrum to competition in the wireless industry militates strongly in favor a lower threshold for that spectrum. A threshold of one-quarter is particularly reasonable given that the Department of Justice ("DOJ") has acknowledged the need to preserve at least four nationwide wireless carriers.[36] CCA anticipates that adopting a lower threshold for spectrum below 1 GHz

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near term, CCA would also support additional refinements. Specifically, to make the screen reflective of the technical, economic, and deployment differences that different spectrum bands pose for carriers (and competition), the Commission should acknowledge the disparate technical and economic characteristics of different spectrum bands. This could include assigning weights to spectrum based on reported valuation by carriers, engineering-based calculations, benchmarks to auction results and secondary market transactions, or some combination thereof. Refinement of the spectrum screen involves an iterative process, with continued vigilance by the Commission to make the screen most accurately reflect evolving competitive dynamics, which represents an important ongoing responsibility for the Commission.

34 *15th Mobile Wireless Competition Report* ¶ 293.

35 *AT&T-Qualcomm Order* ¶ 51.

36 *DOJ AT&T-T-Mobile Complaint* ¶ 36.

would not be disruptive to wireless carriers' current spectrum holdings, given the Commission's proposal to grandfather current holdings into any revised screen.[37]

Further, much of the spectrum below 1 GHz that is suitable for mobile broadband services is currently licensed, and limited amounts of additional spectrum below 1 GHz are likely to become available either through future auctions or through secondary market transactions. Indeed, optimistic estimates predict the upcoming incentive auction process to repurpose up to 120 MHz of spectrum, all below 1 GHz, for mobile broadband use. Revisions to the threshold for spectrum below 1 GHz accordingly would still provide the opportunity for *all* wireless carriers to participate in the forward auction portion of the upcoming incentive auction while promoting competition after the auction has closed.

CCA therefore asks that the Commission adopt a lower screen threshold of one-quarter of useable spectrum below 1 GHz in a given market, and apply a rebuttable presumption (as set forth below) against transactions that exceed this threshold.

2. *Aggregate Spectrum Holdings in Local Markets*

In addition to adopting a separate screen for low-frequency spectrum, the Commission should continue to evaluate an entity's overall spectrum holdings (that is, its aggregated holdings both below 1 GHz and above 1 GHz) in each local market. The Commission could retain the current one-third threshold for assessing an entity's aggregated spectrum holdings—even as it adopts a lower threshold when examining only an entity's holdings below 1 GHz—in light of the important differences between high- and low-frequency spectrum bands. As the NPRM notes, while low-frequency spectrum is particularly useful for expanding a network's geographic coverage, "higher frequency spectrum may be well-suited for providing *capacity*, such as in

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37 NPRM ¶ 49.

high-traffic urban areas."[38] CCA recognizes that wireless carriers serving high-population areas may have legitimate and procompetitive reasons for seeking to increase capacity in those areas to meet growing consumer demand for mobile wireless data services. Nevertheless, CCA continues to have significant concerns about the anticompetitive aggregation of spectrum *above* the current threshold—particularly by AT&T and Verizon. CCA therefore urges the Commission to adopt the rebuttable presumption proposed below regarding transactions that exceed that threshold.

3. *New Nationwide Spectrum Screen*

In addition to these local thresholds, the Commission should formally introduce "a separate threshold that applies on a nationwide basis," as proposed in the NPRM.[39] Both the Commission and DOJ have recognized that competition among wireless carriers is increasingly national in scope, and that transactions involving wireless spectrum often have nationwide competitive effects.[40] In light of these findings, the Commission should establish a national screen that would allow for formal consideration of those effects. The Commission has a number of viable options for calculating mobile spectrum holdings at the national level, such as on a "MHz*POPs" basis or on a "population-weighted average megahertz" basis.[41] While further development of the record is necessary to determine the precise level at which the Commission should set the national threshold, CCA submits that the Commission should set the threshold somewhat below the level that would correspond to one-third of the spectrum deemed "suitable and available" for mobile broadband. A national threshold of one-third or higher may

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38 *Id.* ¶ 35 (emphasis added).

39 *Id.* ¶ 32.

40 *See supra* note 32.

41 NPRM ¶ 34.

ultimately be duplicative of the local thresholds and thus would have limited value for promoting increased competition.

B. The Commission Should Adopt Clear Rules of the Road for Counting Spectrum Under the Revised Screen

In addition to establishing new thresholds for identifying possible competitive harms from spectrum acquisitions, the Commission should remove existing uncertainty as to which spectrum bands are (or will be) included in the revised screen. As an important first step, the Commission should eliminate from the screen (1) the 12.5 MHz of SMR spectrum that the Commission has indicated may not be suitable for broadband, and (2) the 10 MHz of the Upper 700 MHz D Block allocated for public safety use.[42] With respect to SMR spectrum, the Commission has expressly acknowledged that, under its current 800 MHz band plan, only 14 MHz of the original 26.5 MHz of SMR spectrum allocated to mobile telephony would be "suitable and available for mobile broadband services" in the future, and that "the Commission may find it appropriate to reduce the amount of suitable [SMR] spectrum included in the screen from 26.5 megahertz to 14 megahertz to reflect the relevant portion of SMR spectrum through which mobile broadband service can be provided."[43] As for the Upper 700 MHz D Block, Congress recently reallocated that band from commercial to public safety use,[44] thus preventing private entities from using that spectrum for commercial mobile wireless service, at least in the near- to medium-term. The Commission therefore should remove both bands from the spectrum screen.

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42 *Id.* ¶ 29.

43 *AT&T-Qualcomm Order* ¶ 42 & n.126.

44 *See* Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, § 6101(a) ("The Commission shall reallocate the 700 MHz D block spectrum for use by public safety entities in accordance with the provisions of this Act.").

As for new spectrum bands to be added to the screen, the Commission should adopt a clear and predictable mechanism for incorporating additional bands—such as the WCS band and repurposed television broadcast spectrum—into its spectrum aggregation analysis, including by establishing specific deadlines by which those bands would be deemed "suitable and available" for mobile broadband use. The current approach of updating the screen in connection with specific transactions leads to a truncated analysis, and potentially delays the approval of transactions. The Commission should establish "suitable and available" deadlines as part of the rulemaking process for adopting other requirements governing the relevant spectrum bands, such as service rules, build-out timetables, and the like. At the same time, however, the Commission should decline to set a deadline by which EBS spectrum would be deemed "suitable and available," given the unresolved limitations on the use of that spectrum for mobile broadband.[45] Such an approach would provide certainty for carriers contemplating spectrum acquisitions, preserve incentives to build out spectrum in those bands, and prevent AT&T and Verizon from warehousing that spectrum in an attempt to manipulate the screen.

The Commission also should adjust its attribution rules to ensure that the screen captures only those economic interests that give entities a competitively significant amount of control over the spectrum at issue. The Commission's current practice is to attribute "all equity ownership interests of ten percent or more" to those interest holders.[46] In contrast to most aspects of the Commission's spectrum aggregation analysis, this approach is overly stringent, as

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45 *See 15th Mobile Wireless Competition Report* ¶ 281 n.815 (explaining that "while EBS licensees are allowed to lease excess capacity to commercial operators, leased spectrum is subject to various special requirements designed to maintain the primary educational character of services provided," and that "other elements of the EBS licensing regime, such as its solely site-specific character, with the absence of any licensee in various unassigned EBS 'white spaces,' complicate the use of this spectrum for commercial purposes").

46 NPRM ¶ 41.

it sweeps in many interests that lack competitive significance. Indeed, to the extent the Commission tightens the existing screen in other ways, as set forth herein, the Commission will be better positioned to relax its attribution rules to ensure that its analysis does not sweep too broadly. CCA therefore proposes raising the attribution threshold to 25 percent, so that only competitively significant ownership interests count towards a carrier's spectrum holdings under the screen. Notably, Section 310(b)(4) of the Communications Act establishes a 25-percent attribution threshold in the foreign ownership context,[47] reflecting Congress's determination that such a threshold is appropriate for identifying holdings that are competitively significant. The same approach is warranted here.

C. The Commission Should Establish a Rebuttable Presumption That Transactions Exceeding the Screen Thresholds Are Contrary to the Public Interest

Finally, in markets where a transaction exceeds the applicable threshold, the Commission should undertake a more stringent review than the current spectrum screen requires. Specifically, the Commission should establish a rebuttable presumption that a transaction that exceeds any relevant screen would be anticompetitive and contrary to the public interest in those areas. Under the current rubric, "for those markets highlighted by [the screen], the Commission routinely conducts detailed, market-by-market reviews to determine whether the transaction would result in an increased likelihood or ability in those markets for the combined entity to behave in an anticompetitive manner."[48] Thus, the effect of exceeding the screen is a more "detailed" analysis of competitive effects, but not necessarily a more stringent analysis. By contrast, under a presumption-based approach, the applicant would be allowed to proceed with the transaction in those markets *only* if it could rebut the presumption of anticompetitive effects

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47 47 U.S.C. § 310(d)(4).

48 NPRM ¶ 8.

by showing, based on a preponderance of the evidence, that the transaction would benefit competition and advance the public interest.

In the interest of clarity and predictability, the Commission also should articulate the factors it will consider when determining whether an applicant has effectively rebutted this presumption. These factors should include, among other things, promoting and preserving wireless competition; the applicant's purported *need* for the spectrum in order to meet unusually high demand in areas where other wireless carriers have not deployed; whether the applicant has shown that it exhausted other, less competitively harmful options to meet consumer demand in a particular market; the particular spectrum band that is the subject of the proposed transaction, including any technical or marketplace characteristics of the band that are relevant to the Commission's competitive analysis; or whether the applicant has shown that the aggregation of spectrum in a particular band poses no competitive concerns in a given market. The Commission could even take into account the level of competition for special access services in a particular market, recognizing that, in markets where special access rates are unaffordable, carriers may require additional spectrum to provide wireless service with adequate capacity.

These factors also should include a consideration of the particular challenges faced by carriers seeking to provide wireless broadband service in rural areas. Notably, under the spectrum cap in force until 2003, the Commission permitted wireless carriers to hold 10 MHz more spectrum in rural areas than in urban areas.[49] The Commission did so because it recognized that the high cost of deploying in those areas left competition among wireless carriers "largely underdeveloped," and that new entrants in rural areas needed "to achieve economies of

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[49] *Id.* ¶ 7.

scope" in order to compete effectively with "the two incumbent cellular carriers."[50] Today, competitive carriers continue to face challenges in deploying mobile broadband to rural areas. According to the Commission's latest competition report, "[w]hile 82 percent of the total U.S. population lives in census blocks with coverage by three or more mobile broadband providers, this is true for only 38 percent of the rural population."[51] Moreover, as of July 2010, 3.8 million people in rural areas had no mobile broadband access whatsoever.[52] Thus, for transactions with a significant rural component, the Commission should encourage applicants to present evidence that exceeding the screen thresholds is necessary to speed mobile broadband deployment in the affected rural areas.

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50 *See 1998 Biennial Regulatory Review, Spectrum Aggregation Limits for Wireless Telecommunications Carriers,* Report and Order, 15 FCC Rcd 9219 ¶ 84 (1999).

51 *15th Mobile Wireless Competition Report* ¶ 381.

52 *Id.*

CONCLUSION

The Commission's NPRM on reforming its broken spectrum screen is an important step in the right direction. The current screen is deeply flawed, as it fails to account for the special importance of low frequency spectrum for competitive providers, rests on outdated assumptions about the usability of particular spectrum bands, ignores the competitive effects of spectrum aggregation at the national level, and triggers an insufficiently stringent level of competitive analysis. By addressing these shortcomings through the adoption of the reforms proposed above, the Commission would fulfill its "unique responsibility" to protect consumers, promote competition, and address duopoly concerns in the wireless marketplace.[53]

Respectfully submitted,

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[53] *AT&T-Qualcomm Order* ¶ 30.